LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 13 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1182

NOELLE M. HENRY,
Petitioner,

vs.

COAHOMA COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

WILLIAM H. MAYNARD
Stevens Building
Clarksdale, Mississippi

JOE T. PATTERSON
Attorney General of the State of Mississippi
Jackson, Mississippi

WILL S. WELLS
Assistant Attorney General of the State of Mississippi
New Capitol Building
Jackson, Mississippi

Attorneys for Respondents

E. L. MIDDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3080

INDEX

Preliminary Statement 1
Jurisdiction 2
Question Presented 2
Statement of the Case 3
Statement of Facts 3
Discussion of Opinions Below 8
Argument Opposing Petition for Writ of Certiorari 12
Answer to Authorities of Petitioner 22
Conclusion 23
Certificate 24

Appendix—

Opinion A1
Order A10

Table of Cases

Adler v. *Board of Education*, 342 U.S. 485, 96 L. Ed. 517 21
Cramp v. *Board of Public Instruction*, 368 U.S. 278 22
Higgins v. *Carr Bros. Co.*, 317 U.S. 572, 87 L. Ed. 468 9
Lott v. *State*, 239 Miss. 97, 121 So.2d 402 ....9, 11, 14, 16, 17, 18
Memphis & L. R. R. Co. v. *Southern Export*, 117 U.S. 1, 29 L. Ed. 791, 6 S. Ct. 542 18
Monrosa v. *Carbon Black Export, Inc.*, 359 U.S. 180, 3 L. Ed. 2d 723, 79 S. Ct. 710 18
National Labor Relations Board v. *Pittsburgh Steamship Company*, 340 U.S. 498, 95 L. Ed. 479 8
Schware v. *Board of Bar Examiners*, 353 U.S. 232 22
Shelton v. *Tucker*, 364 U.S. 398 22
Skelly Oil Co. et al. v. *Phillips Petroleum Company*, 339 U.S. 667, 94 L. Ed. 1194 8
Torcaso v. *Watkins*, 367 U.S. 488 22
Wieman v. *Updegraff*, 344 U.S. 183 22

TEXTS AND STATUTES

Barron & Holtzoff, *Federal Practice and Procedure*, Vol. 1-A, Section 449, page 792 ..... 11, 13
36 *C.J.S.*, Vol. 36, page 660, Sec. 204 8
36 *C.J.S., Federal Courts*, Sec. 204(25), page 673 9
1942 Code of Mississippi, Recompiled, Sections 6328-07 and 6328-21 16
Federal Rules of Civil Procedure, Rule 15 (b) 10, 13
Title 28, *U.S.C.A.*, Section 1652 18
United States Supreme Court Digest, Annotated, Vol. 5, page 743, Contracts, Section 57 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1182

NOELLE M. HENRY,
Petitioner,

vs.

COAHOMA COUNTY BOARD OF EDUCATION, PAUL M. HUNTER, SUPERINTENDENT, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE COAHOMA COUNTY BOARD OF EDUCATION AND PAUL M. HUNTER, SUPERINTENDENT, ET AL., IN OPPOSITION TO PETITION FOR CERTIORARI

PRELIMINARY STATEMENT

This case was decided originally in favor of respondents by District Judge Claude F. Clayton in an opinion rendered on December 23, 1963, and attached hereto as Appendix A. This opinion of Judge Clayton was unanimously sustained by the Fifth Circuit Court of Appeals on Decem-

ber 3, 1965, which opinion is contained in Appendix B of brief of petitioner.

JURISDICTION

The judgment of the Court of Appeals was entered December 3, 1965. Petition for rehearing was denied January 4, 1966. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

On page 2 of the brief of petitioner counsel states two questions which they say are presented in this case, but an examination of said statement will show that they are argumentative rather than factual. Respondents take the position that the only question presented is as to whether the refusal of the Superintendent of Education of Coahoma County, Mississippi, to recommend the employment of petitioner was because of any reason, or reasons, which would deprive petitioner of any constitutional rights. This point is cogently decided against petitioner in the concurring opinion of Circuit Judge Brown of the Fifth Circuit Court of Appeals where he states the question and then answers it by saying:

> "The Court affirms because the plaintiff failed to prove either that the Superintendent's refusal to recommend her was based on the civil rights activity of her or her husband, or that her husband's criminal record, which the Superintendent did consider, arose primarily from constitutionally protected assertions of civil rights."

STATEMENT OF THE CASE

Before entering into a discussion of the facts of this case, the respondents will point out certain salient facts which petitioner fails to reveal and certain erroneous inferences in which petitioner indulges. Throughout the brief of petitioner her counsel has either affirmed openly, or strongly inferred, that this case involves race issues and its following sequences of violation of civil rights of petitioner.

The facts disclose, as found by both lower courts, that no activities of petitioner nor her husband in NAACP had anything to do with the failure of the Superintendent of Education of Coahoma County School District to recommend petitioner as a teacher. The facts also disclose, as found by both the District Court and the Circuit Court of Appeals, that the reasons assigned by the Superintendent of Education for not recommending the re-employment of petitioner had no relation to any civil or constitutional rights of petitioner, as the civil rights activities on the part of the petitioner and her husband did not enter into the decision of the Superintendent of Education not to recommend the re-employment of petitioner.

STATEMENT OF FACTS

The statement of facts contained in the brief of petitioner is such a combination of facts and argument and so completely sketchy that we will make a brief statement of facts.

In the trial in the District Court, the first witness called by petitioner's attorney was Noelle M. Henry.

This witness testified that she was a Negro teacher in the McCloud School of the Coahoma County School District and had no white pupils in the school. She then went on to review her general teaching activities and training, and in addition some of her outside activities generally connected with the community or the school. She stated that she had always operated under a one year teaching contract from the Coahoma County School Board, and that her last contract had expired at the end of the 1961-1962 school year. She stated that the general method of employment for teachers had been that the principal would recommend, or not recommend, a teacher to the supervisor and the supervisor in turn would inform the Superintendent of Education as to her recommendation.

She stated that she learned that she was not recommended by Superintendent of Education Paul M. Hunter for employment as a teacher for the school year 1962-1963, and that she sought conferences with the appellee Board without success.

In discussing the activities of her husband and herself in the NAACP she said that her husband had been State President since 1953, and that he spent quite a good deal of work in this position. She testified that she was a member of the NAACP (R. 27), but had not been in the school year 1961-1962 (R. 30). She was asked:

> Q. Are you familiar with the NAACP as far as the investigation into the school system is concerned?
>
> A. Yes, I am.
>
> Q. Generally, what is the policy?
>
> A. The policy is that the NAACP doesn't mess in the segregated schools.
>
> Q. Does your husband to your knowledge take any action in regard to segregated schools in the Coahoma District?

A. No, he hasn't taken any action.

Q. Has he taken any action in regard to segregated schools in the City of Clarksdale?

A. No, he hasn't. (R. 27 and 28).

She stated that in 1955 or 1956 he did sign a petition seeking for desegregation of the city schools but had done nothing with regard to segregated schools since that time in his position in the NAACP.

When asked if she were active in the NAACP, she went back to her teaching period and said "I didn't have time to be active in the NAACP." (R. 74).

On Record page 75 she stated that for several years she had listed her NAACP affiliation in her statutory affidavit. The record will show that in only one of the last two or three years did she list NAACP activities and then she wrote in parenthesis "Inactive".

On cross-examination she stated that except for a skip of one year she had worked eleven years as a teacher.

She admitted that all of her teaching contracts had been for one year with no renewal clause, and that each one had been properly carried out by her and properly carried out by the Superintendent of Schools. She stated that her last contract had expired in May 1962 and that the School District had lived up to all the terms of their contract.

Charles Ball, School Principal, and Geraldine White, School Supervisor, both testified generally as to the fact that they recommended plaintiff for reemployment for the school year 1962-1963.

Lillian Rogers Johnson, a former Supervisor of Negro Schools of Coahoma County, Mississippi, stated that she

retired from the position on January 1, 1961. She stated that plaintiff was a good teacher. She went on further to say that at one time Mr. L. L. Bryson, who was then Superintendent of Education, had questioned whether he should reemploy Noelle Henry, appellant, because of her husband who had at one time signed a petition asking for desegregation of the city schools. However, she stated that he did sign the contract with Noelle Henry with no qualifications or conditions.

Paul M. Hunter, Superintendent of Education, was next called as an adverse witness. He stated that during his campaign for election that the question of segregation did not enter into said campaign. He stated that there were approximately 200 teachers in the Coahoma County School District, and that all white teachers taught in the white schools and all Negroes in the Negro schools. He stated that he did not recommend to the Board of Education that it employ appellant for the 1962-1963 school year.

He stated that he knew that appellant was active in NAACP. On questioning, he gave no opinion as to whether or not the overwhelming majority of those voting in Coahoma County wanted to maintain segregation. At one point in the questioning the following remarks and testimony were given:

The Court, addressing himself to attorney for plaintiff asked: "Why don't you ask this witness why he failed to recommend the plaintiff?"

"Mr. Bell: I think that is part of the other side's case. I would prefer they do it if they want to. I think we do know he failed to recommend her and try—tried to make the record show that to the strongest extent possible.

"The Court: Why don't you ask him why he failed to recommend her, or if he failed to recommend her because she was a member of the NAACP?

"Mr. Bell: Our position is that he did and that this kind of question resulted.

"The Court: (To witness) Did you fail to recommend the plaintiff because she was a member of the NAACP?

"The Witness: I did not.

"The Court: Why did you take such action?

"The Witness: Because of the activities that she and her husband were engaged in were highly controversial." (R. 109).

Without going into detail, the reasons given were that at the time the recommendation was withheld the husband of appellant had been convicted of a morals charge, and had a libel suit filed against him by the Chief of Police of the City of Clarksdale, Mississippi, and another libel suit filed against him by the County Prosecuting Attorney of Coahoma County, and that the witness had been advised on reliable authority that a fraudulent conveyance suit against appellant and her husband charging that he had fraudulently transferred property to her would be filed. Under those conditions the witness concluded that the employment of appellant would have a bad influence on the children she taught and other teachers.

Mr. S. B. Wise, President of the appellee Board, who was called as an adverse witness, stated that in answer to interrogatories, he had answered the question regarding the qualifications of the teacher who replaced appellant that she had an A-e license, 0 years experience.

Mr. Paul Hunter was then called by appellees and identified the records which showed that no recommendation had been made to appellee Board for employment of appellant. He also identified certain contracts and minutes which it is unnecessary to discuss here. He reiterated his position that the activities of appellant or her husband

in NAACP had nothing to do with his decision not to recommend her for employment. This concluded the testimony.

DISCUSSION OF OPINIONS BELOW

Before entering into a discussion, or analysis of the opinions below, we make the following legal observations.

In *36 C.J.S.*, Vol. 36, page 660, Sec. 204 (16 of Federal Courts) it is stated that:

> "With respect to questions of local law, the Supreme Court will not ordinarily decide such matters independently or in the first instance, but will look to the trial court for aid."

In the case of *Skelly Oil Co. et al.* v. *Phillips Petroleum Company*, 339 U.S. 667, 94 L. Ed. 1194, which is one of the many cases affirming and re-affirming that legal principle, the Supreme Court decided that it would not re-examine a question of local law determined by the courts below, stating on page 1201 of said opinion:

> "This contention was rejected below, and we do not re-examine the local law as applied by the lower courts."

Again in *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 95 L. Ed. 479, this Court said at page 482:

> "Certiorari is granted 'only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal'."

With reference to this quotation, we submit that this case presents no matter of public interest but is merely a

case of a school superintendent not recommending for re-employment a school teacher with no civil nor constitutional rights being involved.

Another legal observation which is pertinent is that contained in 36 *C.J.S., Federal Courts,* Sec. 204(25), at page 673, where it is said:

> "The burden of showing in what respect the judgment under review is erroneous rests on the party bringing it to the Supreme Court for review * * *"

quoting *Higgins* v. *Carr Bros. Co.*, 317 U.S. 572, 87 L. Ed. 468, among other cases.

Applying the above stated principles to the facts at hand,

1) The District Judge and the Circuit Court of Appeals by unanimous agreement concluded that the case of *Lott* v. *State,* 239 Miss. 97, 121 So.2d 402, was correct in deciding that where no violation of constitutional rights was involved, that the recommendation of re-employment of a teacher in a school system such as is present here lies within the entire discretion of the superintendent of education.

2) That no constitutional rights of petitioner were violated by the Superintendent of Education of Coahoma County School District by not recommending her for re-employment as a teacher.

To sustain our position set forth above, we refer directly to the opinion of the Circuit Court of Appeals in this case where it was stated:

> "The district judge filed a full opinion, stating the facts and issues and the reasons and grounds for his findings, decision and judgment.
>
> "We agree with his decision and judgment and adopt his opinion as our own, and, because we do, it will

be unnecessary for us to repeat or discuss further his findings and conclusions. It will be sufficient to say that we approve and adopt his opinion and the findings and conclusions stated in it and order the judgment AFFIRMED."

For that opinion we refer directly to the opinion of District Judge Claude F. Clayton, which is contained in Appendix A to this brief.

In dealing with the question as to whether or not appellant should have been allowed, under Rule 15 (b), *Federal Rules of Civil Procedure,* to conform to the evidence by adding additional grounds for the relief sought, the Court noted that said original ground was the allegation that appellant was deprived of certain constitutional rights because of her Civil Rights activities, and the Court stated on page 199 of the Record:

"Plaintiff and her husband are both Negroes and the suit as originally filed was predicated on the theory that defendants did not re-employ plaintiff because of her activities and the activities of her husband in the field of civil rights for members of the Negro race. While the underlying purpose of the rule is to permit final disposition of a case on the evidence rather than on pleadings, this proposed amendment would in fact almost entirely change the character of the case. In addition, here we are confronted with a peculiar situation which presents a serious problem of notice and an opportunity to be heard with a full and fair opportunity to develop evidentially the point of inquiry now raised as an issue in the case for the first time by the motion to amend, several days after the hearing was over. The evidence which forms the basis for the motion came into the case in response to questions from the bench. It did not result from nor was it developed by questions from counsel. And, it came in over objection by plaintiff.

> "It was then and is now quite obvious that neither side had prepared to try the case with this area of inquiry in mind. It was equally apparent that neither side at the hearing considered that the Court's inquiry had injected a new issue into the case. With reasonable notice there can be little doubt but that this aspect of the controversy could be much more fully developed."

The Court in rejecting appellant's motion stated that "Modern concepts of justice under our notice practice seem to dictate, in this situation, with the incomplete development of this area of inquiry, that the amendment be not now, at this late date, allowed", citing Barron & Holtzoff, *Federal Practice & Procedure,* Vol. 1-A, Section 449, page 792, to the effect that:

> "As has been pointed out earlier, however, fair notice remains essential, and pleadings will not be deemed amended to conform to the evidence because of a supposed 'implied consent' where the circumstances were such that the other party was not put on notice that a new issue was being raised * * *. The right to amend to conform to proof is necessarily dependent upon the individual facts and circumstances."

However, the Court went further to hold that the case would be dealt with "just as if the plaintiff's motion to amend had been sustained here." (R. 200).

The Court also held that *Lott* v. *State,* 239 Miss. 97, 121 So.2d 402, was controlling, and that the Board of Education, whose members are a party here, "had no power under the statute to employ the appellant as a teacher", stating: "Hence the Board was without any authority to employ her and should not, therefore, properly be in this case." (R. 202).

The Court then said:

> "Thus, it would appear here that the superintendent has good cause and exercised a sound discretion, and that his actions should not now be overturned." (R. 204).

As this Court will note, the opinion of the Lower Court was judicially sound and well reasoned, and we submit that the conclusions on the law and facts should be upheld.

As this Court has well observed, the Circuit Court of Appeals stated unequivocably in regard to the decision of Judge Claude F. Clayton that:

> "We agree with his decision and judgment and adopt his opinion as our own, and, because we do, it will be unnecessary for us to repeat or discuss further his findings and conclusions. It will be sufficient to say that we approve and adopt his opinion and the findings and conclusions stated in it and order the judgment AFFIRMED."

ARGUMENT OPPOSING PETITION FOR WRIT OF CERTIORARI

We shall discuss the positions asserted by petitioner in the order in which they are presented.

1. The denial of employment to petitioner was not arbitrary nor in violation of her rights under the Fourteenth Amendment.

Petitioner in the Circuit Court of Appeals contended that the lower court erred in refusing to allow petitioner to amend her complaint to conform to the evidence at the trial, which in effect was a motion to allow petitioner to introduce evidence as to the stated reasons of the Superintendent of Education of Coahoma County School District

as to his failure to recommend the employment of petitioner several days after the conclusion of the trial of this case in the lower court, and after the lower court had requested counsel for briefs on the merits.

In general the amendment sought was to add to the pleadings the allegation that appellant was not employed because of criminal and civil suits against her husband and her alleged participation in a fraudulent conveyance suit.

None of these allegations were contained in the original complaint and the relief therein sought was predicated solely on allegations that the NAACP activities of appellant and her husband were the reason for the Superintendent of Education not recommending appellant as a teacher.

Appellant indicates that the evidence necessitated her motion to amend, and was introduced by appellees, but this is not a fact. This evidence was not raised by appellees but was given in response to questions by the lower court (R. 109). Also, it should be noted that this testimony was introduced over the objection of appellant, and that at no point in the trial did appellant seek to amend her complaint to include this evidence as a part of said complaint.

We concede that Rule 15 (b) of the *Federal Rules* is quite broad in its scope and generous in its allowance. However, we do not believe that this rule is broad enough to allow a litigant to completely change the theory of his or her lawsuit after the completion of the trial and submission to the Judge without having given any previous indication that such theory was to be changed. As stated in *Barron & Holtzoff, Federal Practice & Procedure,* Vol. 1-A, Section 449, page 792:

> "As has been pointed out earlier, however, fair notice remains essential, and pleadings will not be deemed amended to conform to the evidence because of a supposed 'implied consent' where the circumstances were such that the other party was not put on notice that a new issue was being raised * * *. The right to amend to conform to proof is necessarily dependent upon the individual facts and circumstances."

In our particular case we were given not the slightest notice that this was a new issue which was being raised. On the contrary it will be seen from the Record that the attorney for appellant not only did not raise this issue on the trial but objected to the testimony which he now contends should be used as the basis of a different lawsuit.

It should be particularly noted that this testimony was secured on questioning by the lower court and that appellant (petitioner here) at no time indicated that she considered that said testimony should have been new material bearing on the decision of the case.

In addition to the fact that the allowing of this amendment would raise a new issue after the trial and conclusion of the case is that said amendment contained allegations which would not be competent as evidence because, as argued in our brief on the merits, the reasons for the Superintendent of Education not recommending a person for employment as a teacher are not subject to judicial review. See *Lott* v. *State,* (Miss.) 121 So.2d 402.

We, therefore, respectfully submit that appellant's delayed motion to amend pleadings to conform to the evidence was properly denied. See discussion in this brief of District Court's opinion.

With no thought of disrespect, but for the purpose of some clarity we submit that petitioner's arguments un-

der Nos. 1 and 2 as set forth in pages 9 to 14, and 15 to 21, of petitioner's brief, merge into each other, and not only merge into each other, but are so vague as to cause difficulty in interpreting properly. Thus in this brief, we hereinafter set forth our position in this case.

The fundamental and alternative positions of respondents are:

1) The Respondent Board cannot be enjoined to employ petitioner.

2) The Superintendent of Education cannot be controlled in his recommendations, or non-recommendations, of teachers to be employed in a county-wide school district where no constitutional right is involved.

3) If this Court were to hold that the discretion of the Superintendent of Education could be controlled, and that a failure to recommend petitioner for employment because hers and her husband's NAACP activities deprived her of civil rights, then petitioner's case should not be sustained as she completely failed to show that any NAACP activities of either herself or her husband influenced the Superintendent of Education in his decision not to recommend her as a teacher.

4) If the Court should allow the pleadings to be amended as requested by petitioner, and were to hold that the reasons for not employing petitioner should be considered, then respondents submit that said reasons were completely sufficient.

We shall discuss the above points in the order stated.

1) The Respondent Board cannot be enjoined to employ petitioner.

It is stipulated that the Board of Education is the controlling board for the Coahoma County School District,

which is a county-wide school district as that term is defined under Mississippi law, and comprises all of the territory of Coahoma County, Mississippi, outside of the territory embraced within the Clarksdale Municipal Separate School District, whose boundaries are co-extensive with the boundaries of the City of Clarksdale, Mississippi. The law applicable to the employment of teachers in such districts is contained in Sections 6328-07 and 6328-21, of the *1942 Code of Mississippi, Recompiled.* (See petitioner's brief.)

These sections provide that the board of education of a county-wide school district such as the one here can only employ a teacher for its school district on the recommendation of the superintendent of education. In the case at hand, the Superintendent of Education did not make such recommendation and it follows that the respondent Board under the applicable Mississippi law was and is powerless to employ any applicant for a teacher's position in its district.

In *Lott* v. *State,* (Miss.) 121 So.2d 402, the Supreme Court expressly decided that the board of education had no power to employ a teacher not recommended by the superintendent of education.

We, therefore, respectfully submit that respondent Board was not a proper party to this action.

2) The Superintendent of Education cannot be controlled in his recommendations, or non-recommendation, of teachers to be employed in a county-wide school district.

It is a legal principle which needs no citations of authorities that unless such law contravenes the Constitution of the United States, or the state involved, that each state can provide for its own educational process.

Under the laws of the State of Mississippi it is provided, as previously stated, that before a teacher may be employed in a county-wide school district it is necessary that the superintendent of education recommend such teacher. These provisions of law were tested in the Mississippi case of *Lott* v. *State,* (Miss.) 121 So.2d 402.

In that case a suit was brought by an applicant for the position of school principal to require the county superintendent of education to enter into a contract with him to serve as principal of a school attendance center. It should be here observed that the statutes governing the employment of principals are identical in text for those of employing teachers.

The facts showed that the superintendent of education had previously recommended a man as said principal but the board of education refused to approve him, and further showed that the board, without the recommendation of the superintendent, had approved a Mr. Kelly.

The next relevant record on the minutes is the recitation that the county superintendent recommended in succession three different persons to serve as principal but the board found they were not suitable or qualified. The statement of facts shows further that the undoubted reason the superintendent failed to recommend Mr. Kelly was because he had entered into political criticisms which were not approved of by the superintendent.

The Court held that the statutes in Mississippi contemplated that in county-wide school districts the county superintendent of education has the exclusive right to recommend to the county board of education the principals to be employed, and that said recommendation is a matter of complete discretion with the superintendent.

In discussing the reasons for failure of the superintendent to so recommend in this case the Court said on page 406 of its opinion:

> "Although political and factional considerations should not enter into a recommendation by a county superintendent and an approval by a county board, it is not a judicial function to determine the extent to which those factors affected Lott and the board."

Thus the Supreme Court of Mississippi in this case firmly established the principle that it is not a subject of judicial inquiry as to the reasons a superintendent of education does not recommend a principal or teacher for employment in his school system.

The principle of law is too well established to need confirmance by citation of authorities that the decisions of a supreme court of a state's interpretation of its statutes are binding upon federal courts.

Title 28, *U.S.C.A.*, Section 1652, provides that:

> "The laws of the several states, except where the Constitution or treaties of the United States, or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply."

In addition to the *Lott* case, *supra*, we have in support of our position the unbroken lines of decisions of the United States Supreme Court to the effect that it is not within the scope of judicial power to make contracts for parties.

Monrosa v. *Carbon Black Export, Inc.*, 359 U.S. 180, 3 L. Ed. 2d 723, 79 S. Ct. 710.

Memphis & L. R. R. Co. v. *Southern Export*, 117 U.S. 1, 29 L. Ed. 791, 6 S. Ct. 542.

United States Supreme Court Digest, Annotated, Vol. 5, page 743, Contracts, Section 57.

In a later portion of this brief we shall discuss the authorities cited by petitioner with reference to her contention that a court should inquire into the reasons for the refusal of a superintendent to recommend a person for employment as a teacher.

3) If this Court were to hold that the discretion of the Superintendent of Education could be controlled, and that a failure to recommend appellant for employment because hers and her husband's NAACP activities deprived her of civil rights, then appellant's case should not be sustained as she completely failed to show that any NAACP activities of either herself or her husband influenced the superintendent of education in his decision not to recommend her as a teacher.

We have taken and still maintain the fundamental contention that inquiry into the reasons for a superintendent of education not recommending a person for employment as a teacher are not subjects of judicial inquiry. If this Court holds that we are mistaken in that position, then we submit that petitioner has failed completely to maintain the position set forth in her original complaint.

As heretofore noted, the entire basis for that complaint was that the Superintendent had refused to recommend petitioner as a teacher because of hers and her husband's activites in the NAACP. We need not review the evidence in the case to support our position to the contrary as the Court is very familiar with said evidence. However, we would like to note in passing that in addition to the fact that the Superintendent denied that such activities constituted a reason for his non-recommendation of petitioner, that there is not one word of evidence which would support petitioner's contention that said activities were a reason.

We likewise reiterate our position that even in her complaint petitioner did not allege facts which would indicate that any civil rights of hers within the meaning of the statutes were violated.

We submit that petitioner completely failed to sustain her stated claim.

4) If the Court should allow the pleadings to be amended as requested by appellant, and were to hold that the reasons for not employing petitioner were competent evidence, then respondents submit, that said reasons were completely sufficient.

Although we continue to maintain that the reasons for the Superintendent not recommending employment of petitioner are not the subject of judicial inquiry, we, nevertheless, say that if they are, that said reasons were sufficient.

In answer to questions asked by the Lower Court, the Superintendent, in summary, stated that the reasons for his refusal to recommend petitioner for employment were, first, that the husband of petitioner had been convicted in a court of record of a morals charge; second, that libel suits were pending against the husband of petitioner by the Chief of Police of the City of Clarksdale, Mississippi, and the Prosecuting Attorney of Coahoma County, Mississippi; and, third, that said Superintendent had been reliably informed that a suit was to be filed against petitioner and her husband alleging that fraudulent conveyances had been made by said husband to petitioner.

The Superintendent stated that if petitioner were employed as a teacher, that all the above factors would "be a bad influence on the children and other teachers".

As noted by petitioner in her brief, it was stated in *Adler* v. *Board of Education*, 342 U.S. 485, 96 L. Ed. 517:

> "A teacher works in a sensitive area in a school room. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps."

It seems manifest that the reasons assigned by the Superintendent were sufficient for him, acting within his sound discretion, to follow. The fact that the husband of petitioner was involved in a morals charge, in litigation with a chief of police and a county prosecuting attorney, and that the petitioner would in all likelihood be sued on a fraud charge, would certainly weaken petitioner's position as a teacher of children.

To hold that a court could judge finally the sufficiency of such reasons would naturally be to hold that the superintendent of education could not refuse to recommend for employment for reasons not approved of by the Court. In fact, this would give the courts complete control over the discretion of such superintendents, and we submit that such is not and should not be the law.

We thus submit that, first, the reasons for said non-recommendation in view of the fact that no civil nor constitutional rights were involved, cannot be inquired into by a court, and, second, if they can, they were sufficient.

ANSWER TO AUTHORITIES OF PETITIONER

Counsel for petitioner cites *Wieman* v. *Updegraff*, 344 U.S. 183, to assist position of petitioner. This case is in no way in point in that it involved the discharge of a teacher rather than a failure to employ a teacher, which is the situation in our case. Although counsel for petitioner erroneously states in the index of its brief, and Part II on page 15 of its brief, that petitioner was discharged this, of course, is not the fact, as counsel well knows and admits on page 10 of its brief.

As another illustration of cases cited by petitioner is the case of *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, which is similar to *Shelton* v. *Tucker*, 364 U.S. 398 where the situation presented was a teacher refusing to sign an oath with reference to his activities. This is not the case here presented.

Petitioner likewise cites to support her position *Torcaso* v. *Watkins*, 367 U.S. 488. This case could not possibly have an application to the issue in our case as it merely held that a state cannot disbar a man from state office because he did not swear he believed in God.

Schware v. *Board of Bar Examiners*, 353 U.S. 232.

We submit that this case likewise has no bearing to the case at hand in that it merely states that a state could not make arbitrary standards for admission to the Bar.

Practically all of the other cases cited by petitioner dealt with the discharge of a public employee rather than the refusal to employ persons as public employees which is the fact of our case.

CONCLUSION

In opposing the bid for certiorari, we are fortified with the findings of fact and law on the trial before Honorable Claude F. Clayton, and the unanimous vote of the Justices of the United States Court of Appeals for the Fifth Circuit.

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

JOE T. PATTERSON
Attorney General of the State of Mississippi
New Capitol Building
Jackson, Mississippi

WILL S. WELLS
Assistant Attorney General of the State of Mississippi
New Capitol Building
Jackson, Mississippi

WILLIAM H. MAYNARD
Stevens Building
Clarksdale, Mississippi
Attorneys for Respondents

By: William H. Maynard
Of Counsel

William H. Maynard was admitted to practice in the Supreme Court of the United States on January 8, 1936

CERTIFICATE

The undersigned, one of counsel for Respondents, hereby certifies that on this the ..... day of May, 1966, he served counsel for petitioner, R. Jess Brown, 125½ North Farish Street, Jackson, Mississippi, and Jack Greenberg, James M. Nabrit, III and Derrick A. Bell, Jr., 10 Columbus Circle, New York, New York 10019, with copies of Respondents' brief by mailing the same to the above addresses by United States mail, postage prepaid.

William H. Maynard

WILLIAM H. MAYNARD

Of Counsel for Respondents

APPENDIX A

Opinion

Filed December 26, 1963

(Title Omitted.)

Plaintiff filed her complaint against the County Superintendent of Education and the Board of Education of Coahoma County, Mississippi, alleging that the board had failed to rehire her as a schoolteacher for the school year 1962-1963 because she and her husband are and were engaged in certain civil rights activities with goals and objectives contrary to the policies and views of defendants. She seeks injunctive relief to require that defendants rehire her as a teacher. Through informal assistance from the Court and with the cooperation of counsel for defendants technical requirements of process were perfected or in effect waived in order to make the case triable and to avoid any further unnecessary delay. It was heard by the Court sitting without a jury in complaint and answer. At the conclusion of the hearing the Court directed that the case be submitted on memorandum briefs of the parties. Within the time fixed for plaintiff's brief to come in, she moved to amend her complaint under Rule 15 (b), Federal Rules of Civil Procedure, to conform to the evidence by adding as an additional ground for the relief sought allegations that defendants failed to re-employ plaintiff because of her husband's involvement in lawsuits and a criminal prosecution and the possibility that plaintiff would be joined in a suit to set aside as fraudulent conveyances of property made to her by her husband. This motion is opposed by defendants and was taken with the

case for consideration on briefs. That motion will be dealt with first.

Plaintiff and her husband are both Negroes and the suit as originally filed was predicated on the theory that defendants did not re-employ plaintiff because of her activities and the activities of her husband in the field of civil rights for members of the Negro race. While the underlying purpose of the rule is to permit final disposition of a case on the evidence rather than on pleadings, this proposed amendment would in fact almost entirely change the character of the case. In addition, here we are confronted with a peculiar situation which presents a serious problem of notice and an opportunity to be heard with a full and fair opportunity to develop evidentially the point of inquiry now raised as an issue in the case for the first time by the motion to amend, several days after the hearing was over. The evidence which forms the basis for the motion came into the case in response to questions from the bench. It did not result from nor was it developed by questions from counsel. And, it came in over objection by plaintiff.

It was then and is now quite obvious that neither side had prepared to try the case with this area of inquiry in mind. It was equally apparent that neither side at the hearing considered that the Court's inquiry had injected a new issue into the case. With reasonable notice there can be little doubt but that this aspect of the controversy could be much more fully developed.

Second thoughts now make it seem that this Court might have been derelict in not directing a supplemental hearing, with reasonable notice, for the full evidential development of only this one aspect of the controversy. Undoubtedly, if plaintiff had moved promptly to amend at the

close of the hearing such a course of action then would have been followed. Modern concepts of justice under our notice practice seem to dictate, in this situation, with the incomplete development of this area of inquiry, that the amendment be not now, at this late date, allowed.

"As has been pointed out earlier, however, fair notice remains essential, and pleadings will not be deemed amended to conform to the evidence because of a supposed 'implied consent' where the circumstances were such that the other party was not put on notice that a new issue was being raised * * *. The right to amend to conform to proof is necessarily dependent upon the individual facts and circumstances." Barron & Holtzoff, Federal Practice & Procedure, Vol. 1-A, Sec. 449, page 792.

Accordingly, the motion to amend will be overruled.

However, in order that the Court of Appeals may have the benefit of this Court's views with respect to the incomplete development of the "lawsuit" aspect of this case, in the event of an appeal, it will be dealt with just as if the plaintiff's motion to amend had been sustained here.

In order to put all of the questions in this case in proper perspective the statutory system which exists in the State of Mississippi for the employment of all teachers in such a school system as that with which we are concerned in this case must be understood. Briefly, this system is that teachers have no tenure, but are employed on a one year contract basis. These contracts develop by the principal of each attendance center recommending to the county superintendent of education teachers for employment in his school. If the county superintendent agrees with these recommendations, he recommends to the county board of education that the people so recommended be employed for that school as teachers for the next school year.

If the county superintendent does not agree with the recommendations made by the principal, he makes recommendations of his own initiative. In either event the board of education is powerless to employ anyone as a teacher in such a public school system unless that person is recommended by the county superintendent.[1] This question was specifically at issue in the case of Lott v. State, 239 Miss. 97, 121 So.2d 402 (1960), and the Court held clearly that the board of education had no power to employ as a teacher a person not recommended by the superintendent of education.

In Lott, the position at issue was that of principal of an attendance center. For that position the recommendation to the board originates with the superintendent, but the authority of the board is no different.[2] In that case the superintendent recommended one person to the board for employment in the position, but the board undertook to employ another who for political and personal reasons had not been recommended by the superintendent and the superintendent refused to give the board selected person a contract. Suit was to require him to sign the contract. The Supreme Court of Mississippi, inter alia, said:

"The difficulty here arises because the board on February 1 rejected one of the superintendent's recommendations and undertook itself to exercise the full appointive power. It had the right to reject the recommendation, for cause, but not to make the appointment of one not recommended."

* * *

"However, THE BOARD HAD NO POWER UNDER THE STATUTE TO MAKE APPOINTMENT OF A PRIN-

---

1. Miss. Code Ann. (1942) Sec. 6282-07.
2. Miss. Code Ann. (1942) Sec. 6282-05.

CIPAL WHO WAS NOT RECOMMENDED BY THE COUNTY SUPERINTENDENT." (Emphasis added).

The evidence here is plain and uncontradicted that the county superintendent did not recommend plaintiff for employment. Hence, the board was without any authority to employ her and should not, therefore, properly be in this case. The board would be properly in this case (if it could be at all) only if the superintendent had recommended plaintiff and the board had declined to follow the recommendation. Plaintiff is entitled to no relief against the board.

The question raised by the proposed amendment to the complaint, which has been referred to as the "lawsuit" part of this case will be dealt with next. Responding to questions put from the bench the county superintendent stated that the reasons for his refusal to recommend plaintiff for employment were that the husband of plaintiff had been convicted in a Court of record on a morals charge; that two libel suits were pending against the husband by the Chief of Police of the City of Clarksdale and the Prosecuting Attorney of Coahoma County, and, that he had been reliably informed that plaintiff would probably be sued to set aside as fraudulent, conveyances of property made to her by her husband.

In essence as the Court understands it from the sparse record made on trial, his position was that plaintiff's husband had become notorious in the community and that plaintiff was "tarred with the same brush" in the public mind by reason of her marriage and that she, too, probably would become personally and unfavorably involved in the public mind with the aforementioned fraud action. And, that because of these circumstances she had become un-

suited to teach young children.[3] Assuming arguendo for the moment that the superintendent's discretion is subject to judicial review, it has long been recognized that a teacher of young people occupies a sensitive position. For example, in Adler v. Board of Education, 342 U.S. 485, 96 L. Ed. 517 (1952), it was said:

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. FROM TIME IMMEMORIAL, ONE'S REPUTATION HAS BEEN DETERMINED IN PART BY THE COMPANY HE KEEPS." (Emphasis added).

Thus, it would appear here that the superintendent had good cause and exercised a sound discretion, and that his actions should not now be overturned.

To deal properly with the one principal question presented by the complaint it is necessary to summarize plaintiff's theory with respect thereto and the evidence before the Court. The essence of plaintiff's theory is that she and her husband are long time members of the National Association for the Advancement of Colored People; that her husband is and has been Mississippi president of this organization; that these activities are contrary to the

---

3. It is also uncontradicted that the superintendent did not recommend another teacher for re-employment because of the bad reputation for moral misbehavior of that teacher's spouse.

policies and views of defendants; that she was not re-employed as a teacher because of these facts; and, that thereby she was denied her rights contrary to the Constitution of the United States, especially amendments XIV and XV.

It does not require the citation of any authority to sustain the position that it was plaintiff's burden to establish her case on this theory by a preponderance of the evidence. This she failed to do. In fact, the plain, uncontradicted evidence is that neither her membership nor the membership of her husband in the NAACP, nor the activities of either or both of them in working for the goals and objectives of this organization had anything to do with the refusal of the county superintendent to recommend her to the board of education for reemployment for the school year 1962-1963.

The evidence does show that she was employed, on successive one year contracts, as a teacher in this school system for a period of eleven years (with only one break for one year, which apparently was at her own choice). It also shows that she was recommended for re-employment and that she was reemployed for many years after her membership and the membership of her husband in the NAACP, and the activities of both in the "civil rights" area were well known to the defendant superintendent and his predecessor on this office. There are no racial or civil rights overtones in this record with respect to plaintiff's relationship with the public school officials of Coahoma County nor with respect to the fact that she was not recommended for reemployment as a teacher.

The real reason for the refusal of the superintendent to recommend plaintiff for reemployment (which is uncontradicted by any evidence in this record) has been

dealt with heretofore in discussing what has been called the "lawsuit" phase of this case and plaintiff's motion to amend.

It also must be borne in mind that plaintiff had a one year contract for the school year 1961-1962, that this contract was fully performed by the parties thereto, that it ran its course and expired. That contract is not and could not be in this case. By its terms and under the statutes no rights survived its expiration to any of the contracting parties. Defendants could not have required plaintiff to accept another contract, nor can plaintiff now require that she be given a new contract. The fact that she had been employed as a teacher for one year (or for more than a year) gave her no rights for re-employment for the school year 1962-1963, or for any other year. Whether she would or would not be employed for another year depended entirely on whether she would or would not be recommended by the superintendent. He did not recommend her. That ends the matter.

As was said in Lott, supra:

"Although political and factional considerations should not enter into a recommendation by a county superintendent and an approval by a county board, it is not a judicial function to determine the extent to which those factors affected Lott and the board."

The laws of the State of Mississippi, as interpreted by its Supreme Court in Lott are binding on this Court in this case since there is no provision of the constitution or laws of the United States to the contrary. Title 28, U.S.C. Sec. 1652. And, the evidence is wholly insufficient, as has been said, to make applicable here the constitutional theory relied on by plaintiff.

It also needs remembering that it is not now or has it ever been within the purview of judicial power to make contracts for parties. Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 3 L. Ed. 2d 723, 79 S. Ct. 710 (1959); Memphis & L. R. R. Co. v. Southern Export, 117 U.S. 1, 29 L. Ed. 791, 6 S. Ct. 452 (1882).

None of the cases cited by plaintiff can give her any real comfort. Some of them, for example, deal with the discharge of teachers during the contract period. Clearly they are not in point. Others deal with the power of a state with respect to the creation of standards for the admission to a profession. These have no application here. Another has to do with a suit by Negro teachers for salaries equal to those paid for white teachers. No question of salary is involved in this case. Another holds that there can be no discrimination in the law with reference to the following of occupations. No such discrimination is at issue here. All other authorities cited are equally beside the point, with the exception of Adler, supra, which in part supports this Court's view of this controversy.

From what has been said, it seems obvious that plaintiff is not entitled to the principal relief sought and this Court will not require by injunction that she be re-employed as a teacher in the public school system of Coahoma County, Mississippi.

Ancillary to the principal relief sought plaintiff attacks a requirement of state law that teachers annually file an affidavit listing all organizations of which they are members. Inasmuch as plaintiff in her present status as a non-teacher is not affected by this requirement, this issue is now moot.

Plaintiff is entitled to no relief and an order is being entered this date in accordance with this opinion.

This the 23rd day of December, 1963.

CLAUDE F. CLAYTON
(Claude F. Clayton)
District Judge

Order

(Title Omitted)

In accordance with the opinion of the Court released this date in this cause, it is,

Ordered:

(1) That the motion of the plaintiff, Noelle M. Henry, to amend the pleadings to conform with the evidence shall be and is hereby overruled.

(2) That the prayer of the complaint shall be and is hereby denied and the same is hereby dismissed.

(3) That the defendants are awarded costs from the plaintiff as they may have in course been taxed.

This the 23rd day of December, 1963.

CLAUDE F. CLAYTON,
(Claude F. Clayton),
District Judge.

Ent. C.O. B. 2, p. 568, on December 26, 1963.